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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 513

COOPERSTOWN CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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No. .....

COOPERSTOWN CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

The petition of Cooperstown Corporation, a corporation organized under the laws of the State of Delaware, respectfully shows to this Honorable Court:

Summary Statement of Matter Involved.

The corporate petitioner made its income and personal holding company surtax returns on the basis of cash receipts and disbursements (R. 14a). A capital stock tax return was filed by the petitioner and capital stock tax in the sum of $7,000, the amount shown due on said return, was assessed by respondent against petitioner in 1937, which was paid by petitioner in 1937 and deducted as a tax paid in its income tax return for the calendar year 1937 (R. 14a).

On April 27, 1938 petitioner filed a claim for refund of said capital stock tax on the ground that it was not engaged in business during the calendar year 1937 and was not

liable for the payment of capital stock tax for that year (R. 14a). On October 27, 1939, one year and six months after the filing of the claim for refund, petitioner was advised that said claim was allowed and petitioner received the refund on November 3, 1939 (R. 14a). The amount of that refund was accounted for by petitioner as income in its income tax return filed for the year 1939, the year in which such refund was received (R. 14a).

On March 11, 1941 respondent notified petitioner of a disallowance of the deduction taken by petitioner on its 1937 income tax return of the capital stock tax paid in that year (R. 6a, 8a). Petitioner had declared as dividends in that year more than the amount of its net income after taking the deduction for the capital stock tax of $7,000 which it had paid in that year; but through the disallowance of said $7,000 as a deduction, there resulted an undistributed net income of $4,751.24 and the imposition of a personal holding company surtax of $3,288.43 as well as an additional income tax of $1,050 (R. 10a).

Petitioner duly presented a petition for review to the Board of Tax Appeals (R. 2a-10a) and the case was tried on a stipulation of facts substantially as hereinabove stated (R. 13a, 14a).

The Board found the facts substantially as hereinabove stated (R. 16a, 17a) and decided against petitioner in a memorandum opinion, relying upon *E. B. Elliott Co.*, 45 B. T. A. 82, and *Security Flour Mills Co.*, 45 B. T. A. 671 (R. 18a).

An appeal was duly taken to the United States Circuit Court of Appeals for the Third Circuit (R. 21a-25a).

On January 19, 1944, the Circuit Court of Appeals affirmed the decision of the Board in an opinion which recognized the division of authority on the point, but which

held that, even though in this case petitioner made its returns on a cash receipts and disbursements basis so that no question of accrual accounting could be involved, the court was constrained without itself passing upon the merits to affirm the decision of the Board on the authority of *Dobson* v. *Commissioner,* 320 U. S. 489.

A petition for rehearing pointing out the inapplicability of the *Dobson* case was denied February 4, 1944; but after the decision by this Court of *Security Flour Mills Co.* v. *Commissioner,* 321 U. S. 281, the Circuit Court of Appeals granted a rehearing upon its own motion.

On August 30, 1944 the Circuit Court of Appeals filed a new opinion recognizing the inapplicability of the *Dobson* case but adhering to its original decision, upon novel grounds, in spite of what appears its manifest conflict with the decision of this Court in *Security Flour Mills Co.* v. *Commissioner,* 321 U. S. 281.

The Question Presented.

Whether a corporation making its income tax returns on a cash receipts and disbursements basis, against which a capital stock tax was assessed in 1937 and which actually paid said capital stock tax in 1937, deducting the same on its income tax return for that year, can be deprived of that deduction because in 1938 it filed a claim for refund of said capital stock tax, which claim for refund was allowed in 1939, in which year such capital stock tax was refunded, and in which year the corporation accounted for the refund so received as part of its income for that year.

It would seem as though this issue ought to have been conclusively decided in favor of petitioner by the decision of this Court in *Security Flour Mills Co.* v. *Commissioner,*

321 U. S. 281. Nevertheless, the Circuit Court of Appeals for the Third Circuit decided otherwise not only in apparent conflict with that decision but also in conflict with the interpretation of that decision by the Tax Court in an exactly parallel case, *Stanard-Tilton Milling Co.* v. *Commissioner*, 3 T. C.—No. 127, decided June 23, 1944.

Opinions of Court Below.

Since the opinions of the court below have not appeared in the Federal Reporter, we have printed copies thereof as an appendix to the brief accompanying this petition (*infra*, pp. 25-31).

Statute Involved.

Revenue Act of 1936, Section 23, 49 Stat. 1658, 1659:

> "SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * * *
>
> (c) TAXES GENERALLY.—Taxes paid or accrued within the taxable year except— * * *."

Revenue Act of 1936, Sections 41 and 43, 49 Stat. 1666:

> "SEC. 41. GENERAL RULE.
>
> The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accord-

ance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *"

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the dividends paid credit provided in section 27) provided for in this title, shall be taken for the taxable year in which 'paid or accrued' or 'paid or incurred', dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *"

Jurisdiction to Review Judgment.

1. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (February 13, 1925, c. 229, §1, 43 Stat. 938; January 31, 1928, c. 14, §1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926).

2. Judgment of the Circuit Court of Appeals was entered January 19, 1944. Petition for rehearing was denied February 4, 1944. Thereafter, petition for rehearing was granted on the Court's motion March 2, 1944. Judgment of the Circuit Court of Appeals upon rehearing was entered August 30, 1944. This petition for writ of certiorari was filed September 27, 1944.

Reasons Relied on for Allowance of Writ.

1. In a matter of fundamental importance to all taxpayers, as well as to the Government, the decision below relegates again to a region of doubt the application of a principle clearly restated by this Court in *Security Flour Mills Co.* v. *Commissioner,* 321 U. S. 281, by introducing

new and scarcely comprehensible distinctions and refinements to reach a result directly contrary to that demanded by the aforesaid recent decision of this Court.

The final opinion of the court below says that while under the doctrine of the *Security Flour Mills Co.* case the deduction for capital stock taken in 1937 may *not* be disallowed merely because the amount thereof was refunded in 1939, it must yet be disallowed because such refund established conclusively that in 1937 there was no legal obligation to pay the capital stock tax.

It may be pointed out that even the minor premise involved in the court's reasoning is erroneous. The Board found as a fact (R. 17a), based not only upon the parties' stipulation (R. 14a), but upon the affirmative admission in respondent's answer of that fact as alleged in the petition (R. 3a, 11a), that the capital stock tax was assessed by respondent in 1937. That assessment made the tax a legal obligation in 1937. Moreover, and secondly, in 1939, when the refund was made, the applicable statute (Internal Revenue Code, Sec. 3746) authorized the Commissioner to institute at any time within two years from the date of the refund a suit to recover tax refunds deemed to have been erroneously paid; obviously, therefore, the original non-liability of petitioner for the capital stock tax was not "conclusively established", or established at all, by the allowance of the claim for refund. The question of the original liability or non-liability of petitioner for the capital stock tax was not raised by petition or answer in the Board of Tax Appeals and was not made the subject of any finding by the Board of Tax Appeals.

From the standpoint of every taxpayer, however, and of the Government too, the major premise of the opinion below, the test of "legal liability" which the decision of

the court below superimposes upon the decision of this Court in the *Security Flour Mills Co.* case, practically nullifies that decision and certainly will be the breeder of the utmost confusion in the application of the law.

In this case the taxpayer made its income tax return on a cash receipts and disbursements basis. That basis is intended to furnish a forthright, simple basis for the determination of income tax liability, to be ascertained at the close of each taxable year on the basis of actual receipts and actual disbursements. If a tax (of the class made deductible) paid in good faith may not be deducted unless and except to the extent that it was legally imposed, then it follows that expenses paid in good faith may not be deducted if and to the extent that they may have been paid under a mistaken view as to the legal liability for their payment; and, by a parity of reasoning, sums actually received by way of income would *not* be taxable, if they were paid to the recipient under a misapprehension as to his legal right to receive them. Questions as to the correct tax liability of a person making his tax return on the simplest possible basis, that of actual receipts and disbursements, would never be susceptible of accurate determination until years later when all questions of legal liability to make payments or legal right to receive them had been finally determined.

This is not a case where one taxpayer voluntarily paid a tax assessed against another taxpayer. In that case his payment is "voluntary" and he cannot take a deduction. In the case before this Court, petitioner paid a capital stock tax for its own account which was assessed solely against itself.

It is respectfully submitted that the allowance of the writ is required not only in justice to petitioner but to prevent and forestall the introduction of a new system of judicial

distinctions undermining and destroying the doctrines plainly restated by this Court in *Security Flour Mills Co.* v. *Commissioner,* 321 U. S. 281.

2. The decision below is directly inconsistent with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Nash* v. *Commissioner,* 88 F. (2d) 477, certiorari denied 301 U. S. 700. In that case it appeared that the taxpayer had erroneously paid State income taxes to the State of Wisconsin from 1926 to 1931, inclusive, under provisions of law declared unconstitutional in 1931. In each of these years he had deducted the amount of the State income taxes so paid in computing his Federal income taxes. In 1932, when his Federal income taxes for at least some of the years 1926 to 1931 were still open to review and revision, he received a refund from the State of Wisconsin of the taxes which, as it turned out, he had been under no legal liability to pay. As in the instant case, the taxpayer had made his return on the cash receipts and disbursements basis. The court held that said refund constituted income for the year in which it was received, saying at page 478:

> "It is the Commissioner's contention that a refund resulting from the return of taxes previously paid under a mistaken view of the validity of a state tax is taxable income. Reliance for this view is placed on *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359, 51 S. Ct. 150, 75 L. Ed. 383; *Chicago, R. I. & P. Ry. Co.* v. *Commissioner* (C. C. A.), 47 F. (2d) 990; *Houbigant, Inc.* v. *Commissioner,* 31 B. T. A. 954, affirmed (C. C. A.), 80 F. (2d) 1012.
>
> We accept the views expressed in these opinions."

3. The decision of the court below is in direct conflict with the case of *Stanard-Tilton Milling Co.* v. *Commissioner,* 3 T. C.—No. 127, decided by the Tax Court of the

United States, June 23, 1944. That case involved three issues, of which the second was as follows: The taxpayer in 1935 had paid processing taxes. After the Agricultural Adjustment Act had been declared unconstitutional, it filed a claim for refund. In 1940 the claim for refund was allowed and petitioner received from the Government a refund of the processing taxes paid less the amount of unjust enrichment taxes owing by reason of such repayment. The Commissioner then assessed the taxpayer for additional income taxes for 1935, by reason of his disallowing the deduction which taxpayer (which was on an accrual basis) had taken in 1935 for the processing taxes then paid and which the Commissioner had refunded because the taxpayer had not been legally liable to pay them.

The Tax Court held that the taxpayer was entitled to retain the deduction for the processing taxes paid in 1935. The Court said in an opinion by Judge KERN (Slip opinion, pp. 4, 5):

> "The second issue is whether petitioner is entitled to deduct from its gross income for the year ended June 30, 1935, the amount of certain processing taxes which were paid by it in that year, but which, as respondent contends, were in effect refunded to it in 1940 by reason of their being credited in that year against unjust enrichment taxes agreed to be owing by petitioner. * * * Respondent urges that under the facts shown the deduction taken by petitioner in 1935 in the amount of $525,745.58 should be reduced by the amount of $32,609.35, since although the petitioner paid processing taxes in the greater amount, some part of this was, in effect, refunded in 1940 to petitioner, and, therefore, the amount of the deduction properly taken in 1935 should be adjusted by the amount of the refund granted in the later years, citing *E. B. Elliott Co.*, 45 B. T. A. 82.

> Even though we should agree with respondent's contention with regard to the divisible nature of the settlement made by the parties in 1940 under section 506, we are not able to come to the conclusion urged by him and toward which the *Elliott* case points, for we consider that the application of the principle of the *Elliott* case to the situation here presented is precluded by the recent pronouncement of the Supreme Court in *Security Flour Mills Co.* v. *Commissioner, supra.*"

The Circuit Court of Appeals in its opinion on rehearing says that the case at bar "seems plainly distinguishable" from *Stanard-Tilton Milling Co.* on the basis of the criterion that "it is necessary that the taxpayer be under a legal obligation for the payment at the time it is made or accrued". But the Commissioner of Internal Revenue made the refund to *Stanard-Tilton Milling Co.* precisely because he was of opinion at the time when he made the refund that the Milling Co. had never been under a legal obligation to pay the tax.

The fact that the court below asserts that there is a distinction between the instant case and that of *Stanard-Tilton Milling Co.* emphasizes the confusion which the decision of the court below is bound to create unless it is reviewed.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that court to certify and to send to this Court for its review and determination, a full and complete transcript of the record of all proceedings in this case numbered and entitled on its docket No. 8188, October Term, 1942,

Cooperstown Corporation, Petitioner, vs. *Commissioner of Internal Revenue*, Respondent, and that the said judgment of the said court may be reviewed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

COOPERSTOWN CORPORATION,
Petitioner,

By ALEXANDER B. SIEGEL,
Counsel for Cooperstown Corporation.

Supreme Court of the United States

OCTOBER TERM, 1944

No. .....

COOPERSTOWN CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the Board of Tax Appeals appears at pages 16a to 19a of the record. Copies of the opinions of the Circuit Court of Appeals, which have not yet appeared in the Federal Reporter, are printed in the appendix to this brief (*infra*, pp. 25-31).

Jurisdiction.

The statement as to jurisdiction given in the petition is hereby adopted and made a part of this brief.

Statement.

The statement of the case already given in the petition under the heading of "Summary Statement of Matter Involved" is hereby adopted and made part of this brief.

We may add here a quotation from the petition to the Board of Tax Appeals and from the respondent's answer to show that the question of petitioner's legal liability to pay the capital tax in 1937 was admitted and was not in issue before the Board. The petition for review of the alleged income tax deficiency sets forth (R. 3a):

> "5. The facts upon which the petitioner relies as the basis of this procedure are as follows:
>
> (a) The taxpayer made its income tax returns on a cash basis and not on an accrual basis;
>
> (b) It was assessed by the Commissioner of Internal Revenue for a capital stock tax in 1937 in the sum of $7,000 and it paid said capital stock tax of $7,000 in 1937".

These facts were affirmatively admitted in respondent's answer as follows (R. 11a):

> "5. (a) and (b). Admits the allegations of paragraphs 5(a) and (b) of the petition."

It may be pointed out also that there was nothing capricious in the filing by petitioner of a capital stock tax return. Even after deducting the capital stock tax of $7,000, petitioner had a *net income* in 1937 of $169,680.12 (R. 8a).

Specifications of Errors.

1. The Circuit Court of Appeals erred in holding that petitioner was not entitled to deduct on its income tax return for 1937 the amount of the capital stock tax assessed against and paid by it in that year, even though claim for refund thereof made in 1938 was allowed in 1939 and the capital stock tax was refunded in that year.

2. The Circuit Court of Appeals erred in holding that the allowance of said claim for refund in 1939 established

conclusively that there was no liability for said capital stock tax in 1937.

3. The Circuit Court of Appeals erred in deciding this case on the question of whether or not there actually was a legal liability of petitioner to be assessed for capital stock tax in 1937, since that question was not raised either by the petition to the Board of Tax Appeals or by the answer thereto and was not tried in the Board and there was no finding of fact of the Board on that subject.

Summary of the Argument.

The points of the brief are summarized in the subject index (pp. i, ii).

POINT I.

Petitioner, having made its returns on a cash receipts and disbursements basis, and having been assessed for a capital stock tax in 1937 which it paid in that year, is entitled to retain a deduction for such payment made on its income tax return in 1937, even though said capital stock tax was refunded in 1939.

The fundamental principle that each taxable year is a unit for taxation of income taxes has been often declared and applied in this Court. Its rationale may be summarized as follows: Income taxes are payable with respect to the results of each separate year taken as a unit. Accordingly, whether an income tax return be made on a cash basis or on an accrual basis, the return either is right or is wrong when the return is made, dependent *solely* upon the fact situation at the close of the taxpayer's taxable year; and, therefore, no fact supervening after the close of the taxpayer's taxable

year can make right a return which was wrong when made, or can make wrong a return which was right when made.

The Board of Tax Appeals found as a fact, based upon the allegation of the petition affirmatively admitted in the answer, and upon stipulation of the parties, that the capital stock tax here in question had been assessed against petitioner in 1937 and had been paid by petitioner in 1937 (R. 17a). At the close of the year 1937 it is impossible to doubt that petitioner, making its returns on the cash receipts and disbursements basis, was entitled to a deduction for the capital stock tax assessed against and paid by it. That being established, it follows that later events, that is, the filing of a claim for refund in 1938, the allowance of that claim in 1939, and the repayment of the tax in 1939, could not affect the correctness of the income tax return rendered by petitioner in 1937. Petitioner thereafter correctly returned the amount of said tax *refund* as part of its income for the year 1939.

In a series of cases decided by the Board of Tax Appeals in 1941 and thereafter, beginning with *E. B. Elliott Co.*, 45 B. T. A. 82, the Board of Tax Appeals departed from these principles in the case of taxpayers rendering returns on the accrued basis, so as to allocate to each year items of income or of expense to which they might seem logically to *appertain,* whether or not they legally *accrued* in those years; and in the case of *Louisa Co.* v. *Commissioner,* 45 B. T. A. 1056, followed by it in the instant case, the Board extended this practice to taxpayers making their returns on a *cash* receipts and disbursements basis. The error of these decisions was corrected by this Court in *Security Flour Mills Co.* v. *Commissioner*, 321 U. S. 281, where it said at pages 286, 287:

> "The question is not whether the Board within its discretion made a determination of fact. Compare

Dobson v. *Commissioner*, 320 U. S. 489. It is rather whether, as matter of law, the Board misconstrued the extent of the power conferred by the Revenue Act.

> 'All the revenue acts which have been enacted since the adoption of the Sixteenth Amendment have uniformly assessed the tax on the basis of annual returns showing the net result of all the taxpayer's transactions during a fixed accounting period, either the calendar year, or, at the option of the taxpayer, the particular fiscal year which he may adopt.'[9]

The rationale of the system is this: 'It is the essence of any system of taxation that it should produce revenue ascertainable, and payable to the government, at regular intervals. Only by such a system is it practicable to produce a regular flow of income and apply methods of accounting, assessment, and collection capable of practical operation.'[10]

This legal principle has often been stated and applied.[11] The uniform result has been denial both to government and to taxpayer of the privilege of allocating income or outgo to a year other than the year of actual receipt or payment, or, applying the accrual basis, the year in which the right to receive, or the obligation to pay, has become final and definite in amount.[12]

But the petitioner urges that Section 43 has altered the rule so that a hybrid system, partly annual and partly transactional, may, within administrative discretion, be substituted for that of annual accounting periods. It urges that the change was

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[9] *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359, 363.

[10] *Id.*, p. 365.

[11] See e.g. *Lucas* v. *Ox Fibre Brush Co.*, 281 U. S. 115, 120; *Burnet* v. *Thompson Oil & Gas Co.*, 283 U. S. 301, 306; *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 326; *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620, 624; *Brown* v. *Helvering*, 291 U. S. 193; *Guaranty Trust Co.* v. *Commissioner*, 303 U. S. 493, 498.

[12] See the cases cited Notes 5, 9 and 11.

> due to the desire of Congress to prevent distortion of true income. This must mean distortion of true income, not of a given year, but, in the light of ultimate gain, from a series of transactions over a period of years, growing out of, or in some way related to, an initial transaction in the taxable year. The very section on which petitioner relies, however, reiterates the adherence of Congress to the system of annual periods of computation."

As pointed out in the accompanying petition, since the decision of the *Security Flour Mills Co.* case, the Tax Court has abandoned the practice which it initiated in *E. B. Elliott Co., supra,* and in a case indistinguishable from the instant case has sustained the right of a taxpayer to retain a deduction for taxes erroneously paid but later refunded, the amount of such refund being regarded as income in the year in which the refund was received. *Stanard-Tilton Milling Co.* v. *Commissioner,* 3 T. C.—No. 127, June 23, 1944.

This rule applies with redoubled force in the case of a taxpayer making his return on the cash receipts and disbursements basis. Such a taxpayer necessarily must account for all items of income received in the year of their receipt even though payments may have been made to the taxpayer under a mistake of law or a mistake of fact and even though for that reason the person making the payment to him may be entitled to and may ultimately receive a refund. In the same way, actual payments made by a taxpayer on the cash receipts and disbursements basis of a type giving rise to deductions, such as business expenses, interest, taxes or losses, are deductible in the year in which paid even though it may later turn out that such payments were made under a mistake of fact or of law and are recoverable. In practically every case where a payment is received or a payment is made under a mistake of fact or of

law, the question of whether the payment is recoverable is a doubtful one. It is contrary to human experience that, unless moved by a donative intent, people pay out money for which they are not or do not believe themselves to be legally responsible.

In accordance with the new type of deviation from the rule of determining income tax liability on the annual unit basis, proposed and applied by the court below, the question of a taxpayer's income tax liability is not one to be determined by cash receipts and disbursements or even by whether a taxpayer has in a later year *actually* received or paid a refund of moneys erroneously paid or received by him; for the court below says that the Commissioner might properly have reached same result in this case "Even had no claim for refund been made or as yet allowed." In other words, actual payment of deductible items or, by parity of reasoning, actual receipt of income items, do not determine the income tax liability even of a taxpayer on a cash receipts and disbursements basis, but his tax returns are to be subject to constant readjustment and change based upon the Commissioner's view as to whether or not the taxpayer could have asserted a defense against a payment actually made by him or was subject to a valid claim to make repayment of amounts actually received by him as income.

This view, we submit, is an even more dangerous innovation and encroachment upon the rule of annual determination of liability for income tax than the practice which this Court condemned in the *Security Flour Mills Co.* case, following an unbroken series of decisions of this Court; and if this view were to be permitted to gain a foothold, it would again plunge into the realms of uncertainty substantially every income tax return made by every taxpayer.

POINT II.

The assessment of the capital stock tax in 1937 made it a legal and inescapable obligation in that year.

We have seen that the petition to the Board of Tax Appeals alleges that petitioner "was assessed by the Commissioner of Internal Revenue for a capital stock tax in 1937 in the sum of $7,000 and it paid said capital stock tax of $7,000 in 1937" (R. 3a) and that said allegation was affirmatively admitted by respondent in his answer (R. 11a). The same fact was also stipulated by the parties and found as a fact by the Board.

That this assessment created a legal liability of the most peremptory nature is unquestionable. *Graham* v. *DuPont*, 262 U. S. 234; *Phillips* v. *Commissioner*, 283 U. S. 589, 595, 596.

The fact that the tax may have been assessed erroneously made it no less a tax when it was paid. Petitioner could not enjoin its collection (Revenue Act of 1928, Sec. 617, 45 Stat. 877) and if petitioner had not paid it, collection could have been enforced by distraint (Revenue Act of 1934, Sec. 701 (d), 48 Stat. 769; Revenue Act of 1926, Sec. 600, 44 Stat. 93; R. S. Sec. 3187).

Accordingly, even adopting what we assail as the spurious test proposed in the opinion of the court below, which makes legal liability as ultimately ascertained rather than actual payment the criterion, the capital stock tax was deductible by petitioner in 1937 because, due to the assessment of said capital stock tax in 1937, petitioner was in 1937 under a positive and, indeed, an incontestable legal liability to pay said tax.

The court below was in patent error when it held that the making of the refund in 1939 "conclusively estab-

lished" that there was no legal liability to pay the capital stock tax in 1937. In the first place, the making of the refund in 1939 did not and could not retroactively relieve the binding force in 1937 of the assessment of the capital stock tax made in that year by respondent. In the second place, the making of a tax refund establishes nothing with respect to actual liability, because if it should appear to the Commissioner at any time within two years after the making of the refund that the tax refunded was actually owing and that the refund had been made in error, the Commissioner is expressly authorized by statute to bring suit for the recovery of the tax refunded (Internal Revenue Code, Sec. 3746).

POINT III.

Whether or not petitioner was in fact and in law liable to assessment for capital stock tax for the year 1937 was not in issue before the Board of Tax Appeals, was not tried before the Board of Tax Appeals, and that Board made no findings on the subject and, accordingly, the Court below was in error in basing its decision upon its assumption with respect to that matter.

Since petitioner was assessed for capital stock tax in 1937, it seems to be utterly immaterial to the decision of this case whether or not such assessment was in fact or in law erroneous.

Assuming, however, that that question might be material, if properly raised, it could not be made the basis for a decision by the court below because it was not in issue in the Board of Tax Appeals, which made no finding on the subject. *General Utilities Co.* v. *Helvering*, 296 U. S. 200;

Helvering v. *Wood*, 309 U. S. 344, 349; *Helvering* v. *Cement Investors, Inc.*, 316 U. S. 527, 535.

Even apart from the assessment made in 1937, in the absence of any evidence on the subject, petitioner was presumptively liable for the capital stock tax in 1937.

Pursuant to Regulations 64 (1936 edition) promulgated by the Secretary of the Treasury relating to capital stock tax, every corporation in existence during any part of a taxable year was required to file a capital stock tax return for that year, except in cases where the corporation had previously received a letter from the Commissioner specifically exempting it from filing a capital stock tax return (Art. 32). Article 42 of these Regulations established the presumption that every corporation organized for profit was engaged in doing business. We quote excerpts from Article 42:

> "Accordingly, regardless of the nature of its activities, any corporation organized for profit and carrying out the purpose of its organization is doing business within the meaning of the Act. * * *
>
> The case is exceptional in which the activities of a corporation organized for profit do not amount to doing business within the meaning of the Act. Such a case is generally limited to one in which the corporation is not pursuing the ends for which organized, i.e., profit."

Article 73 of the Regulations sets forth in detail the voluminous material required to be submitted to the Commissioner by a corporation organized for profit if it attempts to secure exemption from the payment of capital stock tax, such enumeration being preceded by the following warning:

> "As corporations are generally organized to do business, every corporation is presumed to be sub-

> ject to the tax unless it submits evidence satisfactory to the Commissioner that it has not carried on or done business during any part of the taxable year. Accordingly, exemption from the tax must be established by an official ruling by the Commissioner."

Article 74 suggests in terms that where a corporation organized for profit seeks to claim exemption on the ground that it was not engaged in business, it would be preferable to make the claim in a claim for refund because if the claim for exemption is denied, interest on the tax accrues at the statutory rate from the due date and not from the date when the exemption was rejected.

Whether or not petitioner was legally liable to assessment for capital stock tax for the year 1937 was dependent upon whether in accordance with the actual facts relating to its activities, or lack thereof, which resulted in the acquisition by it of net income during said year of approximately $170,000, it met the strict test asserted by this Court in *Magruder* v. *Washington, Baltimore & Annapolis Realty Company,* 316 U. S. 69, reversing 120 F. (2d) 441.

The conclusion of the court below that petitioner's actual non-liability for the payment of capital stock tax in 1937 was "conclusively established" by the refund of the capital stock tax has already been shown to be wholly lacking in foundation (*supra,* p. 21).

Consequently, in the absence of any issue, proof or finding on the subject in the Board of Tax Appeals, the court obviously could not make this case turn upon whether or not the assessment of capital stock tax made against petitioner in 1937 was or was not erroneous.

The very fact, however, that the decision of the court below in its nature would require the determination of this difficult collateral matter before there could be established the correct income tax liability of petitioner for the year

1937, petitioner being on the cash receipts and disbursements basis, is eloquent and conclusive proof that the whole theory of the court below is erroneous, that it introduces a new and dangerous element into the decision of income tax cases, resulting necessarily in widespread confusion and delay in determining income tax liability, and that it is in the highest degree desirable that the decision of the court below be reviewed in this Court.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Third Circuit and finally reverse it.

Dated, September 23, 1944.

ALEXANDER B. SIEGEL,
Counsel for Petitioner.

Appendix.

Opinion of the Court.

(Filed January 19, 1944)

By JONES, Circuit Judge.

The facts material to the question raised by the pending petition for review were found by the Board of Tax Appeals as stipulated by the parties. The findings show the following situation.

The corporate petitioner kept its books on a cash receipts and disbursements basis and made its returns for federal tax purposes on that basis. In 1937 it filed a capital stock tax return showing a $7,000 capital stock tax liability, which the Commissioner thereupon assessed and the petitioner paid in that year. In its income tax return for the calendar year 1937 the taxpayer claimed and took a deduction for the capital stock tax so paid in 1937 and, on April 27, 1938, filed a claim for refund therefor on the ground that it was not engaged in business in 1937 so as to become liable for capital stock tax for that year. The claim for refund was later allowed and, on November 3, 1939, the Collector accordingly paid the taxpayer $7,000 and interest thereon. In its income tax return for the calendar year 1939, the taxpayer reported as income received by it during that year the $7,000 tax refund with interest and paid income taxes thereon.

The Commissioner held, however, that, since the taxpayer was not liable for capital stock tax in 1937, the deduction taken in its 1937 return for the payment of such tax should be disallowed and, accordingly, determined a deficiency in the taxpayer's income taxes and personal holding company surtaxes for 1937. The Board, upon the taxpayer's petition for a redetermination, sustained the Commissioner's action and the taxpayer filed the pending petition for a review of the Board's decision.

While the subject-matter of the review relates solely to the petitioner's tax liability for the year 1937, the ques-

tion, as presented to the Board of Tax Appeals and as disposed of by it, was whether the Commissioner may, if the procedure be not barred by the statute of limitations, readjust the petitioner's income tax return for the earlier year, in the light of the subsequent tax refund, by disallowing the deduction taken for the tax payment, or whether the deduction should stand as originally claimed and the corresponding tax refund of the later year be charged as income to the petitioner in the year received.

Whatever differences of opinion may have heretofore existed as to the problem present under circumstances such as are here found, or as to the rule applicable thereto,[1] we think there is no longer any room for controversy since the recent decisions of the Supreme Court in Dobson v. Commissioner, 320 U. S. —— (decided December 20, 1943), and Dixie Pine Products Company v. Commissioner, 320 U. S. —— (decided January 3, 1944).

In the Dobson case, Circuit Courts of Appeals were admonished to be careful, upon reviewing decisions of the Tax Court (formerly the Board of Tax Appeals) not to mistake questions of fact for questions of law and to give to facts determined by the Tax Court no less finality than is properly accorded, upon court review, to administrative determinations in other fields. Concretely, what that meant in relation to the Dobson case was that the Tax Court's decision that a recovery had by that taxpayer in 1939 (the taxable year there in question) growing out of a particular transaction, entered into ten years before, was a return of capital and not income was a determination of a fact competently found by the Tax Court according to relevant

[1] Compare the decision of the Board of Tax Appeals in E. B. Elliott Co. v. Commissioner, 45 B.T.A. 82, 91, with its decision in William H. Block et al. v. Commissioner, 39 B.T.A. 338, 341, aff'd sub nom. Union Trust Co. v. Commissioner, 111 F. 2d 60 (C. C. A. 7). Also compare Bergan v. Commissioner, 80 F. 2d 89 (C. C. A. 2); Leach v. Commissioner, 50 F. 2d 371 (C. C. A. 1); and Inland Products Co. v. Blair, 31 F. 2d 867 (C. C. A. 4) with Athens Rollar Mills, Inc. v. Commissioner, 136 F. 2d 125 (C. C. A. 6); Davies' Estate v. Commissioner, 126 F. 2d 294 (C. C. A. 6); J. A. Dougherty's Sons, Inc. v. Commissioner, 121 F. 2d 700 (C. C. A. 3); and Commissioner v. Central Union Bank, 99 F. 2d 568 (C. C. A. 6).

accountancy principles and, as such, was binding upon the reviewing court.

As the Tax Court had found in the Dobson case that the recovery did not constitute income to the taxpayer, the year of its taxability was obviously not a question in that case. But that was the question present in the Dixie Pine case, where the Commissioner disallowed a deduction for a tax payment accrued for the taxable year under review, the taxpayer having later obtained release from liability for the item deducted. The Board sustained the Commissioner's action and the Court of Appeals affirmed the Board's decision. 134 F. 2d 273 (C. C. A. 5). In affirming, the Supreme Court held that the Board's "determination that the item in question was not properly deducted on the accrual basis is entitled to the finality indicated by Dobson v. Helvering, 320 U. S. ——." We think that the ruling in the Dixie Pine case necessarily determines the disposition to be made of the question here involved. We do not see how any distinction is to be drawn from the fact that the tax for which a deduction was taken in the instant case was actually paid, the taxpayer being on a cash receipts and disbursements basis, while in the Dixie Pine case the tax liability was accrued, the taxpayer reporting on the accrual basis. The authority for deducting the one is no different than that of the other. Sec. 23 (c) of the Revenue Act of 1936, c. 690, 49 Stat. 1648.

The decision of the Board of Tax Appeals is affirmed.

Opinion of the Court Upon Rehearing.

(Filed August 30, 1944.)

By JONES, Circuit Judge.

Our decision in this case was based upon what we took to be the requirements of the ruling in Dobson v. Commissioner, 320 U. S. 489, particularly, as interpreted and applied in the case of Dixie Pine Products Company *v.* Commissioner, 320 U. S. 516.

Burnet *v.* Sanford & Brooks Company, 282 U. S. 359, and cases following it, had indicated that income received or accrued and disbursements made or accrued were automatically to be accounted for in the year (calendar or fiscal) in which they had actually been received or paid, respectively, or were accruable depending upon the accounting system used by the particular taxpayer. Assuming the instant taxpayer's payment of a capital stock tax in 1937 to have been a certain and fixed liability, the payment would seem to have been deductible in the taxpayer's return of its gross income for the year 1937. By the same token, the refund in 1939 of the earlier tax payment, later found to have been erroneously made in 1937, would seem to have been accountable as income to the taxpayer in the year of the receipt of the refund. The Commissioner might not arbitrarily, merely because the statute of limitations had not run, redetermine the taxpayer's liability for an earlier year by disallowing, because of a related refund in a subsequent year, the deduction taken in the earlier year for the tax paid in that year. However, in the light of the opinions in the Dobson and Dixie Pine cases, we held that whether the taxpayer's payment of the capital stock tax in 1937 was a properly allowable deduction for that year involved a matter which fell peculiarly within the Tax Court's competence to determine.

Shortly thereafter, in Security Flour Mills Company *v.* Commissioner, 321 U. S. 281, Mr. Justice Roberts, speaking for the Supreme Court, after quoting from Burnet *v.* San-

ford & Brooks Company, supra, to the effect that the Revenue Acts contemplate "annual returns showing the net result of all the taxpayer's transactions during a fixed [calendar or fiscal yearly] accounting period," said (p. 286) that "The uniform result has been denial both to Government and to taxpayer of the privilege of allocating income or outgo to a year other than the year of actual receipt or payment, or, applying the accrual basis, the year in which the right to receive, or the obligation to pay, has become final and definite in amount." The effect of this appeared to be the reestablishment of the intendment of the Sanford & Brooks case in full vigor and to restrict certain expressions and implications of the Dobson case. Confirmation of this impression is impliedly to be found in the fact that, in the Security Flour Mills case, Mr. Justice Douglas and Mr. Justice Jackson (who wrote the opinion in the Dobson case) were "of opinion that the [Security Flour Mills] case is governed by *Dobson* v. *Commissioner*, 320 U. S. 489, and that the judgment should, for the reasons therein stated, be reversed."

It was in that situation that we granted rehearing of the instant case. Having now fully reconsidered the matter, particularly in the light of the more recent decisions of the Supreme Court, as above cited, we are of the opinion that our decision was correct, not because the ruling of the Sanford & Brooks case has been in any way impaired or qualified, but because the taxpayer's obligation to pay at the time the payment was made, for which a deduction was contemporaneously taken, involves a legal question which must be decided adversely to the taxpayer in the instant case.

It is true that the taxpayer in 1937 filed a capital stock tax return for that year showing a tax liability which it promptly paid. The return and tax payment were accepted by the Collector as of course without audit or other formal action designed to render the taxpayer's liability final and definite in amount. In other words, the taxpayer's capital stock tax return and its tax payment in accordance therewith represented its own voluntary appraisal of its liability.

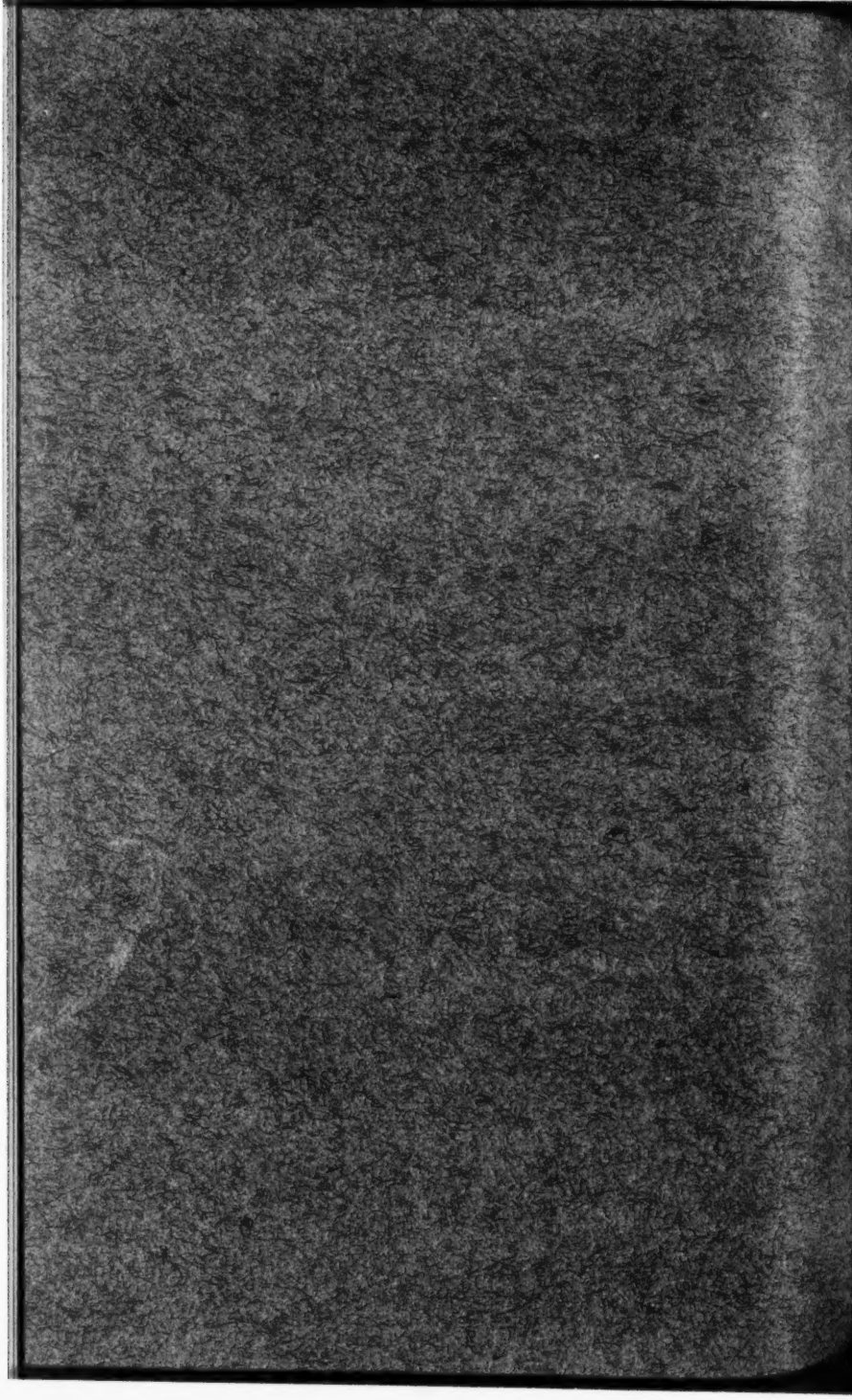
It was in March 1938 that the taxpayer filed its income tax return for the year 1937 wherein it took a deduction for the capital stock tax which it had paid during the taxable year. On April 27, 1938, the taxpayer filed a claim for refund with the Commissioner on the ground that it was not liable for the capital stock tax in 1937. While we predicate nothing upon the brevity of time between the taxpayer's filing of its income tax return for 1937 and its claim for refund for the capital stock tax for which it had lately claimed credit as an allowable deduction, the circumstance does give point to the fact that before the Commissioner could be expected in ordinary course to audit or otherwise consider the return, the taxpayer itself was indirectly assailing the capital stock tax deductions which it had taken in the return.

The tax return for 1937 still being open and being the subject of review by the Commissioner, we think that he was well within his legal province in disallowing the deduction claimed for the payment of the capital stock tax in 1937 for which the taxpayer was not liable. That the taxpayer was not so liable was conclusively established upon the allowance and payment of its claim for refund which was well within the time available for the Commissioner's review of the taxpayer's income tax return for 1937. But, this is not a case of relating back to a reported complete transaction of an earlier year, a matter which occurred in a later year.

Even had no claim for refund been made or as yet allowed, it would, none the less, have been within the Commissioner's power, the return still being open to review, to disallow the deduction for the payment for which there was no legal liability resting upon the taxpayer. In order to isolate a payment or an accrual of a liability as a completed transaction in the year in which it is made or accrued, it is necessary that the taxpayer be under a legal obligation for the payment at the time it is made or accrued. On the basis of that criterion, the recent case of Stanard-Tilton Milling Co. *v.* Commissioner, 3 T. C. No. 127, which the taxpayer urges upon us, seems plainly distinguishable. Where a liability for a state tax rested upon a taxpayer which denied the validity of the tax and was contesting its imposi-

tion in which it was ultimately successful, the circumstance of the taxpayer's denial and contest of the liability was held sufficient to render the liability so uncertain and indefinite as to deprive the taxpayer of the right to accrue the tax in the year for which it was assessed. See Dixie Pine Products Company *v.* Commissioner, supra. No less unwarranted can be a deduction for a tax payment for which indisputably no liability existed.

The Board having correctly concluded that the item in question was not a legally allowable deduction from the taxpayer's gross income for the year 1937, we accordingly confirm our former decision and reaffirm the decision of the Board of Tax Appeals.



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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 513

COOPERSTOWN CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 16–19) is unreported; the opinions of the Circuit Court of Appeals (R. 40–43, 27–30) are not yet officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 30, 1944 (R. 44). The petition for a writ of certiorari was filed on September 27, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where a corporation voluntarily pays a tax for which it is not liable, may the amount paid be deducted as "Taxes paid" under Section 23 (c) of the Revenue Act of 1936?

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra*, pp. 6–9.

STATEMENT

The Board of Tax Appeals found the facts (R. 16–17) as they were stipulated (R. 13–15). They may be summarized as follows:

Taxpayer, a Delaware corporation, kept its books and made its returns of income and personal holding company surtax upon the basis of cash receipts and disbursements, the returns being filed with the Collector of Internal Revenue at Newark, New Jersey (R. 17). In 1937, taxpayer filed with the Collector a capital stock tax return reporting a capital stock tax liability of $7,000; the Commissioner assessed the tax so reported; and taxpayer paid it. Taxpayer then took a deduction on its income tax return for the calendar year 1937 [filed in March 1938 (R. 42, 15)][1] for the $7,000 so paid. (R. 17.)

---

[1] The tax return reveals (R. 15) that the first payment was made on March 15, 1938, presumably the date the return was filed. The taxpayer has never contested the Government's view that the deficiency notice of March 11, 1941 (R. 6), was timely under the three-year statute of limitations (Appendix, *infra*, p. 9).

On April 27, 1938, taxpayer filed in the office of the Collector of Internal Revenue a claim for refund of the capital stock tax on the ground that it was not engaged in business during the calendar year 1937 and was not liable for payment of capital stock tax for that year (R. 17).

The Collector advised the taxpayer on October 27, 1939, that its claim for refund was allowed and on November 3, 1939, the Collector paid taxpayer $7,000, together with interest thereon as provided by law (R. 17).

Taxpayer filed an income tax return for the calendar year 1939 in which it included as income received the $7,000 of refunded capital stock tax together with the interest paid it thereon, and taxpayer paid income tax for 1939 thereon (R. 17).

The Commissioner determined that, since taxpayer was not subject to a federal capital stock tax in 1937, the deduction taken on its income tax return for a 1937 capital stock tax would not be allowed (R. 8–9, 17). The date of the deficiency notice was March 11, 1941 (R. 6). The Board of Tax Appeals sustained the Commissioner's determination (R. 18–19). The Circuit Court of Appeals affirmed (R. 40–43).

ARGUMENT

The capital stock tax was imposed by Section 105 of the Revenue Act of 1935, c. 829, 49 Stat.

1014, "upon every domestic corporation with respect to carrying on or doing business * * *." Every corporation liable for the tax was required to file a return by a designated date and the tax was required to be paid without assessment on or before the expiration of the period for filing the return.

Taxpayer paid a capital stock tax in 1937 and subsequently filed a claim for refund on the ground that it was not liable for the tax. The claim was promptly allowed and the payment made was refunded. (R. 14, 17.) Accordingly, it is here agreed that the taxpayer was not liable for the capital stock tax. Moreover, there never was any disagreement upon that point.

This is not a case where a tax was paid upon the demand of a Collector and the non-liability was subsequently determined upon the termination of a controversy. The decision below rests upon the narrow ground that the payment represented the taxpayer's own voluntary appraisal of its liability and that the acceptance of the tax by the Collector and the assessment which automatically followed the filing of the return are not equivalent to a demand by the Government.

The court below distinctly held that the absence of liability during the taxable year was the basis of its decision and that this is not a case of relating back a subsequent event. None of the cases relied upon by the taxpayer involved this situation and they are, therefore, clearly distinguishable and there is no conflict.

The recent decision in *Dixie Pine Co.* v. *Commissioner,* 320 U. S. 516, 519, makes it plain that the right to a deduction depends upon the concurrent existence in a given year of all the essential elements "which fix the amount and the fact of the taxpayer's liability * * *", for otherwise the income of that year would not be truly reflected. In that case the missing element was the acknowledgement of liability, but payment without a liability should no more entitle a taxpayer to a deduction than did liability without an acknowledgment in the *Dixie Pine* case.

Taxpayers should not be permitted, by paying voluntarily take which they do not owe, to secure the benefit of deductions which are intended to take into account only actual tax liabilities.

CONCLUSION

The case was correctly decided below. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
J. LOUIS MONARCH,
WARREN F. WATTLES,
Special Assistants to the Attorney General.

OCTOBER 1944.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE I—INCOME TAX

* * * * *

SUBTITLE B—GENERAL PROVISIONS

* * * * *

PART II—COMPUTATION OF NET INCOME

* * * * *

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(c) *Taxes Generally.*—Taxes paid or accrued within the taxable year, * * * [with exceptions not material here]

* * * * *

PART IV—ACCOUNTING PERIODS AND METHODS OF ACCOUNTING

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the dividends paid credit provided in section 27) provided for in this title shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *

* * * * *

SEC. 48. DEFINITIONS.

When used in this title—

* * * * *

(c) *Paid, Incurred, Accrued.*—The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part.

* * * * *

SUBTITLE C—SUPPLEMENTAL PROVISIONS

* * * * *

SUPPLEMENT L—ASSESSMENT AND COLLECTION OF DEFICIENCIES

SEC. 271. DEFINITION OF DEFICIENCY.

As used in this title in respect of a tax imposed by this title "deficiency" means—

(a) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(b) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

SEC. 272. PROCEDURE IN GENERAL.

(a) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency.

* * * * *

(g) *Jurisdiction Over Other Taxable Years.*—The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes

for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid.

* * * * *

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this title shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

SEC. 277. SUSPENSION OF RUNNING OF STATUTE.

The running of the statute of limitations provided in section 275 or 276 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under section 272 (a)) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Board, until the decision of the Board becomes final), and for sixty days thereafter.

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IN THE

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OCTOBER TERM, 1944.

No. 513.

COOPERSTOWN CORPORATION,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF.

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REPLY BRIEF.

Summary of Argument of Reply Brief.

Respondent's brief in opposition does not deny the grounds for the granting of the writ advanced in the application.

Respondent incorrectly states the question presented by this case.

A tax paid pursuant to an erroneous assessment is deductible under Section 23 of the Revenue Act of 1936 even though it was not paid under protest or duress.

Certain of the factual statements in respondent's brief are unsupported by the record.

Finally, even if the question presented by this case were, as stated by respondent, whether taxes actually but

erroneously paid, without protest and not under duress, are deductible, that question is itself of such major importance that this Court should issue the writ of certiorari for its determination.

(1)

Respondent's brief does not deny the grounds for the granting of the writ advanced in the application.

Respondent's brief in opposition to the granting of the writ does not deny (1) that the decision below places a novel qualification upon the effect of the decision of this Court in *Security Flour Mills Co.* v. *Commissioner,* 321 U. S. 281; (2) that it is directly inconsistent with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Nash* v. *Commissioner,* 88 F. (2d) 477, certiorari denied, 301 U. S. 700; or (3) that it is in direct conflict with the decision of the Tax Court rendered June 23, 1944 in *Stanard-Tilton Milling Co.* v. *Commissioner,* 3 T. C.—No. 127.

It is true that by incorrectly stating the question involved in this case, the Government seeks to avoid a patent conflict with the doctrine of the *Security Flour Mills Co.* case; but the conflict with the above-cited decisions of the Circuit Court of Appeals for the Seventh Circuit and of the Tax Court still remains, because those decisions, reaching results contrary to that of the Court below, were made in factual situations precisely the same as those present in the instant case.

(2)

Respondent incorrectly states the question presented by this case.

Respondent incorrectly states the question presented in this case as whether, where a corporation voluntarily "pays a tax for which it is not liable", the amount may be deducted

as "Taxes paid" under Section 23 (c) of the Revenue Act of 1936, 49 Stat. 1658, 1659.

The question really is whether where a corporation *pays a tax erroneously assessed against it* (R. 3a, 11a, 14a), but refunded two years later (R. 14a), the amount of the tax *so assessed and paid* may be deducted as "Taxes paid" under the applicable Revenue Act.

The question as now stated by the Government was not raised by the pleadings (R. 3a, 11a) or by the Stipulation of Facts (R. 13a, 14a), was not considered or decided in the opinion of the Board of Tax Appeals (R. 16a-19a), was not presented by the petition for review to the Circuit Court of Appeals (R. 22a), and is not presented by the statement of facts appearing in its original opinion.

(3)

A tax paid pursuant to an erroneous assessment is deductible even though it was not paid under protest or duress.

Respondent appears to place the burden of his argument upon the fact that the capital stock taxes were paid "voluntarily", which means, we presume, without protest or duress. This is a false issue for two reasons: (1) because the statute provides that "Taxes paid" shall be deductible without qualification—not only taxes paid under protest or duress; and (2) because Congress, after having eliminated the common law requirement of protest or duress with respect to the payment of taxes in many specific cases (see *United States* v. *Hvoslef*, 237 U. S. 1; *Greenport Basin & Construction Co.* v. *United States*, 269 Fed. 58), finally abolished as to *all* internal revenue taxes the common law rule expressed in *Chesebrough* v. *United States*, 192 U. S. 253, by Section 1014 (a) of the Revenue Act of 1924, 48 Stat. L. p. 343, which inserted in Section 3226 of the Revised

Statutes, referring to suits for refund of taxes, the following provision:

> "but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress."

This amendment, now carried into Section 3772 (b) of the Internal Revenue Code, has been held by this Court to be applicable even to suits against Collectors of Internal Revenue (*George Moore Ice Cream Co., Inc.* v. *Rose,* 289 U. S. 373).

Obviously, therefore, when Congress authorized the deduction of "Taxes paid", it authorized the deduction of all taxes paid, whether or not erroneously assessed, and whether or not paid under protest or duress.

(4)

Certain of the factual statements in respondent's brief are unsupported by the record.

The claim for refund of capital stock taxes was by no means "promptly" allowed as asserted at page 4 of respondent's brief; over eighteen months elapsed before its allowance (R., 14a). Nor is it the fact that "it is here agreed that the taxpayer was not liable for the capital stock tax" (Resp., Br. p. 4); the question was not even in issue below and there is no evidence or finding on the subject. Nor is there evidence in the record to sustain respondent's assertion (Resp., Br. p. 4) that "there never was any disagreement on that point"; the delay of eighteen months in allowing the claim for refund argues strongly to the contrary.

(5)

Even if the question in this case were as stated by the Government, it is of such general importance that the application for a writ of certiorari should be granted.

The Government asserts that taxes paid under a mistake of fact or of law are not deductible as "Taxes paid" under Section 23 (c) of the Revenue Act of 1936 unless paid under protest or duress.

If that assertion were true, it would be equally applicable to the identical provisions in other Revenue Acts and to Section 23 (c) of the Internal Revenue Code as it stands today.

Practically every tax payable by a corporation, or even by an individual, other than real estate taxes, is paid, like the capital stock tax, pursuant to a report or return, the *making* of which is *compulsory,* upon which the amount of the tax is computed by the taxpayer. Under the contention here made by the Government, every payment of tax made by every taxpayer pursuant to a tax return would be classed as "voluntary", and non-deductible as a "Tax paid", if erroneously computed, although actually paid as and for a tax.

This contention is made in the teeth of the fact that an amount so paid clearly comes within the definition of "any internal revenue *tax* alleged to have been erroneously or illegally assessed or collected" in Section 3772(a) of the Internal Revenue Code, which provides for the maintenance of suits or proceedings to recover the same; and also comes within the definition of "an overpayment of any *tax*" as used in Section 322 of the Internal Revenue Code relating to refunds.

The Government points to no administrative ruling, to no Regulation and to no decided case as supporting its contention.

The Government in effect implies that there shall be inserted in the statute by judicial construction, after the words "Taxes paid", something like the following: "(to the extent ultimately held to be correctly assessed, or if paid under protest or duress)".

The widespread effect of such an interpretation of the statute, never heretofore adopted, and directly contrary to the decisions of the Circuit Court of Appeals for the Seventh Circuit and of the Tax Court cited on page 2, *supra*, is beyond debate. If that be, in truth, the single question involved in this case, then it is respectfully submitted that this Court should issue its writ of certiorari in order that there may be a final determination of that question.

Respectfully submitted,

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